

# Administrative and Litigation Records

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# **Administrative & Litigation Records**

## **INTRODUCTION**

The following materials contain a discussion of the statutes in the Public Information Act (the “Act”) and other law that are relevant to administrative and litigation records and to requests for rulings involving such records. The materials include a discussion of sections 552.022, 552.103, 552.107, 552.111, 552.301 and 552.302 of the Government Code, as well as rule 503 of the Texas Rules of Evidence and rule 192.5 of the Texas Rules of Civil Procedure.

## **PROCEDURAL AND RELEASE PROVISIONS OF THE ACT**

### **SECTION 552.301**

Section 552.301 prescribes the procedures and deadlines for asking the Office of the Attorney General (the “OAG”) for a ruling on whether information is excepted from disclosure.

### **WHAT MUST A GOVERNMENTAL BODY DO WHEN A REQUEST IS RECEIVED?**

- Determine if the governmental body is claiming any exceptions to disclosure. A governmental body can choose not to assert a discretionary exception and to release information that is not deemed confidential by law.
- Section 552.301(b):
  - Within 10 business days of receipt of the request for information, a governmental body must:
    - send the OAG a written request for a ruling, stating every exception the governmental body believes may be applicable; and
    - send the requestor (a) a written statement the governmental body wishes to withhold information and has asked the OAG for a ruling and (b) a copy of the communication with the OAG.
- Section 552.301(e):

- Within 15 business days of receipt of the request for information, a governmental body must:
  - send the OAG (a) written comments in support of each exception or privilege claimed; (b) a copy of the written request for information; (c) a signed statement of the date of the receipt of the request or evidence sufficient to establish the date; and (d) a copy of the requested information, or representative samples if the information is voluminous, labeled to indicate which exceptions apply to which part of the information; and
  - send the requestor a copy of the written comments (which the governmental body may redact to avoid disclosure of the substance of the information at issue).

### **SECTION 552.302**

Section 552.302 prescribes the consequences for the failure to comply with section 552.301.

- If a governmental body fails to comply with section 552.301, the requested information is presumed to be subject to required public disclosure, and the information must be released, unless there is a compelling reason to withhold the information.
- Sections 552.103, 552.107(1), and 552.111, Texas Rule of Evidence 503, and Texas Rule of Civil Procedure 192.5 are generally not compelling reasons for non-disclosure under section 552.302.

### **SECTION 552.022**

Provides for required public disclosure of 18 categories of information, with limited exceptions.

- Examples: a completed report, audit, evaluation or investigation made by or for a governmental body; information in an account, voucher or contract relating to the receipt or expenditure of public funds by a governmental body; information in an attorney's fee bill.
- Information encompassed by section 552.022 may not be withheld from disclosure unless the information is expressly made confidential under the Act or other law.
- Sections 552.103, 552.107(1), and 552.111 are discretionary exceptions to disclosure under the Act; as such, these sections do not make information confidential under the Act, and are not "other law" that makes information confidential for purposes of section 552.022.

- However, the attorney-client privilege under Texas Rule of Evidence 503 and core attorney work product privilege under Texas Rule of Civil Procedure 192.5 are “other law” for purposes of section 552.022.

## **RELEVANT EXCEPTIONS TO DISCLOSURE**

### **SECTION 552.103**

#### **WHAT INFORMATION IS PROTECTED?**

Information related to civil or criminal litigation involving a governmental body, or its employees in their employment capacities, that was pending or reasonably anticipated on the date the governmental body received the request for information.

#### **WHAT MUST A GOVERNMENTAL BODY DEMONSTRATE?**

- 1) The governmental body is a party to pending or reasonably anticipated litigation
- 2) on the date the governmental body received the request

AND

- 3) how the information at issue is related to the pending or reasonably anticipated litigation.

#### **WHAT CONSTITUTES LITIGATION?**

- Civil or criminal action in a judicial forum.
- Contested case under the Texas Administrative Procedure Act, Government Code chapter 2001.
- Internal grievances that are conducted in a quasi-judicial forum. Establishing factors may include:
  - Use of administrative procedures;
  - Multi-level hearing process before administrators;
  - Grievant representation by counsel;
  - Grievant presentation of evidence and witnesses who testify on grievant's behalf; and
  - Completion of internal grievance procedures requirement before grievant can appeal to a court of competent jurisdiction.

- For **pending litigation**, the governmental body must provide sufficient evidence to demonstrate litigation was pending on the date the request was received. For example:
  - A copy of a pleading showing a lawsuit involving the governmental body was filed on or before the date the request for information was received by the governmental body.
  - An explanation of the details of the pending litigation, including when the litigation was filed, the cause of action, and who is involved.
- For reasonably **anticipated litigation**, the governmental body must provide “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” For example:
  - Receipt of a letter containing a specific threat to sue the governmental body from an attorney representing a potential opposing party.
  - A potential opposing party filed a complaint with the Equal Employment Opportunity Commission (“EEOC”).
  - A potential opposing party threatened to sue your agency on several occasions and hired an attorney.
  - Receipt of a notice of claim letter from a potential opposing party that is in compliance with the notice requirements of the Texas Tort Claims Act, chapter 101 of the Civil Practice and Remedies Code, or an applicable municipal ordinance.
  - A potential opposing party hired an attorney who made a demand for disputed payments and threatened to sue if payments were not made promptly.
  - The governmental body is a prospective plaintiff and the evidence reflects anticipated litigation of a specific matter is “realistically contemplated.”
- Examples of **not meeting the reasonably anticipated standard**:
  - A potential opposing party publicly threatens to sue, but does not actually take objective or concrete steps toward filing a lawsuit.
  - A potential opposing party has hired an attorney who makes a request for information.
- The governmental body must explain how the submitted information is **related to** the pending or reasonably anticipated litigation.

### **IMPORTANT POINTS TO REMEMBER WHEN RAISING SECTION 552.103**

- The protections of the litigation exception under section 552.103 are waived by failure to comply with the procedural requirements of section 552.301.
- Section 552.103 does not make information confidential under the Act, and is not “other law” for purposes of section 552.022.
- Once information has been obtained by all parties to the litigation, through discovery or otherwise, the information cannot be withheld under section 552.103.
- The applicability of section 552.103 ends once the litigation has concluded or is no longer anticipated.

## **SECTION 552.107(1) AND TEXAS RULE OF EVIDENCE 503**

### **WHAT INFORMATION IS PROTECTED?**

Communications between and among clients, clients' representatives, clients' lawyers, and clients' lawyers' representatives, made for the purpose of providing legal services to the client that were intended to be confidential and have remained confidential.

### **WHAT MUST A GOVERNMENTAL BODY DEMONSTRATE?**

The governmental body must demonstrate four elements:

- The information constitutes or documents a communication.
- The communication was made for the purpose of facilitating the rendition of professional legal services to the client governmental body.
  - An important question here is: In what capacity is the lawyer communicating? Is she communicating as a manager, as an employee, or as a lawyer?
- The communication is between the client, the client's lawyer, or their representatives.
  - Identify all parties to the communications and explain their relationship to the governmental body. Don't forget to identify any third-party consultants who have a common interest with the governmental body.
  - Do not merely state, "All parties are city employees." It is the governmental body's burden to demonstrate each party is a privileged party with respect to the communication at issue.
- The communication was intended to be, and has remained, confidential.
  - Parties making and receiving the communication must have intended for the communication to be confidential.
  - The communication may not have been shared with any non-privileged party since it was made.
  - If an e-mail in an e-mail chain is separately responsive to the request and exists separate and apart from the submitted e-mail chain, that e-mail is not protected by the attorney-client privilege if it is communicated to a non-privileged party.

## WHEN TO ASSERT SECTION 552.107(1) vs. WHEN TO ASSERT RULE 503

- Raise section 552.107(1) if the information at issue is not subject to section 552.022.
- Raise rule 503 if the information is subject to section 552.022 because the Texas Supreme Court held the Texas Rules of Evidence are “other law” for section 552.022 purposes.
  - For example, an attorney fee bill is subject to section 552.022(a)(16). Communications between privileged parties within the fee bill may be withheld under rule 503.
  - Section 552.107(1) does not make information confidential under the Act, and is not considered “other law” for purposes of section 552.022. Thus, section 552.107(a) **will not apply** to section 552.022 information.
- Rule 503 is not a confidentiality provision and should not be claimed in conjunction with section 552.101 of the Government Code.

## ATTORNEY FEE BILLS

- Attorney fee bills are expressly public under section 552.022(a)(16) and no part of an attorney fee bill may be withheld under section 552.107(1).
- However, if a governmental body can establish that certain entries in an attorney fee bill consist of, document, or reveal privileged attorney-client communications, such information may be excepted from disclosure under rule 503.
- For each particular entry a governmental body seeks to withhold in a fee bill, it must show how the entry (1) reveals a communication (2) between privileged parties that (3) was made for the rendition of legal services and (4) was intended to be, and has remained, confidential.
- Even though an attorney may have provided an entire fee bill to a client governmental body, a governmental body may not withhold the entirety of a fee bill as a privileged communication.
  - Section 552.022(a)(16) provides that information “that is *in* a bill for attorney’s fees” is not excepted from required disclosure unless it is confidential under other law or privileged under the attorney-client privilege. Thus, this provision, by its express language, does not permit the entirety of an attorney fee bill to be withheld.

## IMPORTANT POINTS TO REMEMBER

- “Creating,” “drafting,” or “preparing” an e-mail, memorandum or document does not indicate that the e-mail, memorandum or document was sent or communicated. The governmental



body needs to explain whether the e-mail, memorandum, or document was actually communicated.

- The attorney-client privilege of section 552.107(1) and rule 503 are waived by failure to comply with the procedural requirements of section 552.301.
- If information is subject to section 552.022, the attorney-client privilege under section 552.107(1) does not apply because section 552.107(1) does not make information confidential under the Act and does not consist of “other law” for purposes of section 552.022.
  - However, if a governmental body can demonstrate that the information subject to section 552.022 consists of or reveals privileged attorney-client communications, then the governmental body may be able to withhold the information under the attorney-client privilege of rule 503.

## **SECTION 552.111**

### **WHAT INFORMATION IS PROTECTED?**

An interagency or intra-agency memorandum or letter that would not be available by law to a party in litigation with the agency.

The OAG has interpreted section 552.111 to incorporate two distinct types of privileges:

- the deliberative process privilege (information related to policy matters), *and*
- the attorney work product privilege (information related to litigation).

### **SECTION 552.111-DELIBERATIVE PROCESS PRIVILEGE**

The purpose of the deliberative process privilege is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process.

- In Open Records Decision No. 615 (1993), the OAG determined the deliberative process privilege under section 552.111 protects only those internal communications that consist of advice, opinions, and recommendations that reflect a governmental body's policymaking process.
- In *City of Garland v. Dallas Morning News*, 22 S.W. 3d 351 (Tex. 2000), the Supreme Court upheld the OAG's interpretation of the deliberative process privilege and concluded section 552.111 does not protect personnel-related communications that do not involve policymaking.

### **WHAT TYPES OF INFORMATION ARE PROTECTED?**

- Interagency and intra-agency communications that consist of advice, opinions, and recommendations that reflect the policymaking processes of a governmental body.
- **Intra-agency communications** include (1) internal communications relating to a governmental body's policymaking processes and (2) communications with a governmental body's consultant who is acting on behalf of the governmental body.
- **Interagency communications** include communications with other governmental entities with which a governmental body shares a privity of interest or common deliberative process with respect to the communications.

- The information must pertain to the governmental body's policy mission. Policymaking does not include information pertaining to a purely administrative or personnel matter, unless the administrative or personnel matter is of a broad scope sufficient to affect the governmental body's policy mission.
- Preliminary drafts of a policymaking document prepared by a governmental body or its consultant that has been released, or is intended for release, in its final form.
  - The draft must pertain to policymaking. The entire draft, including factual information and edits, is protected.
  - If a policymaking draft will not be released in its final form, then portions of the draft may be subject to the deliberative process privilege.
- Factual information that is severable from advice, opinions, and recommendations is not protected.

#### **WHAT MUST A GOVERNMENTAL BODY DEMONSTRATE?**

- Explain how the information at issue relates to the governmental body's policy mission.
- If the information pertains to administrative or personnel matters, explain how and why the administrative or personnel matter is of a broad scope so as to affect the governmental body's policy mission.
- If the information involves officials or employees of the governmental body, explain who they are and why they are qualified to make policy.
- If an outside consultant is involved, identify the consultant, explain the consultant's relationship to the governmental body, and explain the task the consultant is performing for the governmental body.
- If another governmental entity is involved in a communication or in the preparation of a draft document, explain why the other governmental body has a privity of interest or shares a common deliberative process with your governmental body.
- If the information at issue is a draft of a document, explain how it qualifies as a policymaking document and state whether the draft has been or is intended to be released in its final form.

## **IMPORTANT POINTS TO REMEMBER**

- If the deadlines under section 552.301 are not met, the deliberative process privilege under section 552.111 is waived.
- If information is subject to section 552.022, the deliberative process privilege under section 552.111 does not apply and the information may not be withheld on that basis.

### **THE ATTORNEY WORK PRODUCT PRIVILEGE OF SECTION 552.111**

In Open Records Decision No. 647 (1996), the OAG concluded section 552.111 also encompasses the attorney work product privilege. We issued a more expansive explanation of the work product privilege in Open Records Decision No. 677 (2002).

## **WHAT INFORMATION IS PROTECTED?**

- Material prepared for and mental impressions developed, as well as communications made, in anticipation of litigation or for trial by or for a party or its representatives.
- Encompasses the attorney work product privilege found in rule 192.5 of the Texas Rules of Civil Procedure.

## **WHAT MUST A GOVERNMENTAL BODY DEMONSTRATE?**

- Explain how the information at issue consists of material or mental impressions developed by or for your governmental body in anticipation of litigation or for trial, *or*
- Explain how the information at issue is a communication made between your governmental body and its representatives in anticipation of litigation or for trial; *and*
- Identify the parties or potential parties to litigation, the person or entity that prepared the information, and any individual with whom the information was shared.

## **IMPORTANT POINTS TO REMEMBER**

- The attorney work product privilege under section 552.111 is waived by failure to comply with section 552.301.

- If information is subject to section 552.022, the attorney work product privilege under section 552.111 does not apply because section 552.111 does not make information confidential under the Act and does not consist of “other law” for purposes of section 552.022.
  - However, if a governmental body can demonstrate that the information subject to section 552.022 contains core attorney work product, then the governmental body may be able to withhold the information under the attorney work product privilege of rule 192.5 of the Texas Rules of Civil Procedure.

## **THE ATTORNEY WORK PRODUCT PRIVILEGE OF RULE 192.5**

### **WHAT INFORMATION IS PROTECTED?**

- If information is subject to section 552.022, then a governmental body should claim the attorney work product privilege under rule 192.5 because rule 192.5 is “other law” for purposes of section 552.022.
- Rule 192.5 protects only “core” attorney work product, which is defined as the work product of an attorney or an attorney’s representative, developed in anticipation of litigation or for trial, that contains the attorney’s or the attorney’s representative’s mental impressions, opinions, conclusions, or legal theories.

### **WHAT MUST A GOVERNMENTAL BODY DEMONSTRATE?**

- Explain how the information was created for trial or in anticipation of civil litigation, *and*
- Explain how the information consists of mental impressions, opinions, conclusions, or legal theories of an attorney or an attorney’s representative.

### **IMPORTANT POINTS TO REMEMBER**

- The core attorney work product privilege under rule 192.5 is waived by failure to comply with the procedural requirements of section 552.301.
- Rule 192.5 can apply only to information that is subject to section 552.022. A governmental body should claim the attorney work product privilege under section 552.111 for information that is not subject to section 552.022.

## **THE ATTORNEY WORK PRODUCT PRIVILEGE OF SECTION 552.111 AND RULE 192.5**

- An attorney's or party's representatives can include legal assistants, paralegals, consultants, insurers, agents, indemnitors, or sureties.
- In *Curry v. Walker*, 873 S.W.2d 379, 381 (Tex. 1994), the Texas Supreme Court held that a request for a district attorney's "entire file" was "too broad" and, citing *National Union Fire Insurance Co. v. Valdez*, 863 S.W.2d 458, 460 (Tex. 1993), held that "the decision as to what to include in [the file] necessarily reveals the attorney's thought processes concerning the prosecution or defense of the case." *Id.* at 380. Accordingly, a request for an attorney's entire litigation file implicates the attorney work product privilege. If the litigation file is not subject to section 552.022, you may assert the file is excepted from disclosure in its entirety under section 552.111 because such a request implicates the work product aspect of the privilege. If the litigation file is subject to section 552.022, you may instead assert the file is excepted from disclosure in its entirety under rule 192.5.
- The attorney work product privilege continues after litigation has concluded or is no longer anticipated.

## **WHAT MUST A GOVERNMENTAL BODY DEMONSTRATE?**

- Explain how the information was created for trial or in anticipation of litigation. You must demonstrate that
  - A reasonable person would have concluded from the totality of the circumstances that there was a substantial chance that litigation would ensue, **and**
  - The party resisting discovery believed in good faith there was a substantial chance litigation would ensue and created or obtained the information for the purpose of preparing for such litigation.
    - A substantial chance of litigation does not mean a statistical probability, but rather "that litigation is more than merely an abstract possibility or unwarranted fear."
- The applicability of the work product privilege depends on the facts and circumstances that existed when the information was created.